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Supreme Court of the United States

October Term, 1941

Docket No. 1074.

ERNEST E. MOORE, Doing Business as MOORE MOTOR FREIGHT LINES,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees.

ANSWER TO MOTION TO AFFIRM.

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ANSWER TO MOTION TO AFFIRM.

Pursuant to Rule 12, paragraph 3, and Rule 7, paragraphs 3 and 4, the appellees moved that the decree of the District Court be affirmed, and the appellant hereby answers said Motion, and sets forth the following reasons why the motion to affirm should be denied.

STATEMENT OF FACTS.

The appellant introduced evidence before the Interstate Commerce Commission to establish that he started in the transfer business in 1906 and in long distance hauling by trucks in 1929, using his own equipment at that time (R. 42) and operating over the routes and in the territory as set forth in his applications for a certificate before the Interstate Commerce Commission. That from January to June, 1935, he operated over the routes applied for about three or four times a week, using twelve to fourteen pieces of leased equipment, and one tractor and trailer, which he owned but which was in the name of one Arlo Davis, and a pick-up truck, which he used to transfer freight from customers to his garage, where the freight was transferred to the larger trucks (R. 48, 59, 90). That the twelve or fourteen pieces of equipment that he used, he had under verbal leases and claimed to have an equity in this equipment by advancing drivers money to pay finance companies for the same. That he paid for the use of this leased equipment by the hour, by the trip, or on percentage basis. That he had complete control of collection and handling of freight. That in 1936, he had written leases with the various truckers that were operating for him, said written leases being obtained as a result of instructions from the Interstate Commerce Commission that written leases were required. That the leases were enterd into for a period of ten (10) years, with a thirty-day cancellation clause (R. 65, 66). That he hauled commodities for from 70 to 75 shippers, with whom he did business. That he published his own tariffs; and had a permit to operate in Minnesota

in the year 1933, under his own name, and a permit in Wisconsin in the years 1934 and 1935 for the truck which he owned and which he was operating under the name of Arlo Davis (R. 83, 84, 101, 103). That the State of Iowa was cognizant that he was operating through that State under leased equipment. That Illinois required no permits and had no regulation of motor vehicles in 1935 and prior thereto. That owner-operators who were hauling for appellant (some of whom filed applications for certificates themselves) stated in their applications that they were, in fact, hauling for the appellant (R. 130, 189, 208).

That in his exceptions to the proposed report of the Examiner (which was filed with the Interstate Commerce Commission on October 19, 1938) your appellant set forth the names, docket number and status of some of the owner-operators from whom the appellant leased equipment, as follows:

Trucker	*Docket No.*	*Status*
Tony Bullock	MC 80379	Application withdrawn
E. C. Knodt	MC 46388	Application withdrawn
Harry H. Schmidt	MC 20390	Show Cause Order issued and application dismissed for want of prosecution.
W. N. Olson	.....	The I. C. C. has no record of an application.
Ora D. Smith	MC 92443	Application withdrawn
H. W. Hockema	MC 73836	Show Cause Order issued and application dismissed for want of prosecution.
Gard Gibson	MC 36809	Application withdrawn
Anton Rechtzigel	MC 75921	Application withdrawn
Geo. Schumann	MC 51007	Show Cause Order issued and application dismissed for want of prosecution.
Arlo Davis	.....	The I. C. C. has no record of an application.

That the appellant paid Arlo Davis' taxes and registration fees, and paid him a salary for driving appellant's truck (R. 189, 193) That appellant instructed his drivers what routes to take (R. 227). That in 1929, 1930 and 1931, appellant had twelve trucks that he owned himself. That he owned nine trucks in 1932, seven or eight in 1933, and two in 1934. That in the years 1935 and 1936 appellant hauled approximately twenty million pounds of freight per year. Your appellant advertised in telephone books, periodicals, etc. He carried cargo insurance on all freight; had a garage and mechanic to keep the equipment in condition; paid for gas and oil used by the drivers, and charged it to them (R. 267, 269, 271, 274, 275). Practically all of the freight moved under bills of lading made out by appellant, and freight bills were issued with appellant's name printed on the same (R. 269, 271, 274, 275, 303).

Appellant advanced money for meals for the drivers of the trucks, and saw that their equipment was in proper shape when it left his garage, and maintained a mechanic for that purpose. Appellant has been operating his office and garage at 566 Cedar Street in St. Paul since 1906, is widely known among the shippers of freight; is absolutely responsible for the shipments of freight; made out his own freight bills; listed all of the business, paid claims, carried cargo insurance, instructed the drivers where to deliver the freight, assisted them in purchasing their gasoline, tires and financing their trucks, and held himself out to the shipping public as the person who was, in fact, responsible for the shipment of freight.

Appellant was also a member of, and registered under the N. R. A. and the Code of Fair Competition for the trucking industry prior to June 1, 1935.

ARGUMENT.

We earnestly maintain that the District Court of the United States erred in sustaining the order of the Interstate Commerce Commission, which denied any rights whatsoever, to operate as a common carrier, contract carrier, or broker in Interstate Commerce.

In order to determine whether or not a carrier had the dominion and control over the vehicles used in transporting freight, the Interstate Commerce Commission, in the case of Dixie Ohio Common Carrier, 17 M. C. C. 735, applied a yard stick in determining whether there was such dominion and control. In that case, the Commission said:

> "Applying the principles so indicated to the present case, the evidence shows that the traffic transported in the vehicles of the owner-operators moved on bills of lading issued by applicant, which assumed full responsibility as a common carrier therefor. The consignors of the shipments dealt only with applicant. The vehicles, while in its service, were registered under applicant's operating authority and had applicant's name printed, or otherwise shown, thereon. Insurance covering them was arranged for and paid for by applicant. Its dispatchers or other employees directed the time and manner of the loading and unloading of the vehicles, and also directed their movement over applicant's route. There was continuing authority to issue such directions. The conclusion follows, therefore, that as to its operations in which such vehicles were employed, applicant was a common carrier by motor vehicle as defined in section 203 (a) (14) of the act."

In the O. D. L. Forwarding Corporation Contract Carrier Application, 26 M. C. C. 481, the Commission apparently relaxed its yard stick rule in this case, when it decided that, although the applicant did not have leases, only paid for each trip, only had operating authority in Indiana, although it was operating in Ohio, Wisconsin, Illinois and Missouri, did not have any vehicles at all, merely put an unexecuted lease in evidence, which could be terminated by five days notice, but because the operator carried public liability, property damage, cargo and workmen's compensation insurance, and that the owner operators had to employ drivers that were acceptable to the applicant, and that the employees were paid by the owner of the equipment, that upon these facts, and the fact that the applicant entered into an agreement with the shippers to assume full responsibility for the safe delivery of the freight tendered to it, and maintained a claim department to pay proper claims, that it assumed full control and management of the trucks used in its service. On these facts the Commission granted the applicant a certificate.

In the present case we believe the record shows a much stronger dominion and control. Appellant had leases which ran for ten years, and had to have a thirty-day notice of cancellation; he paid for gasoline and oil, for the cargo insurance, helped finance the men in purchasing these trucks, advanced money to them; did all of the billing under his own name; had all of the customers; inspected the trucks before they left the garage; had a mechanic to see that they were in mechanical condition; instructed the drivers where to go, and what freight to pick up on their return trip, and for this the appellant was receiving ten

per cent, when he paid the owner-operators on a percentage basis. A much larger percentage, which we understand was approximately 35% was retained by the O. D. L. Forwarding Corporation, which, of course, would allow them to pay for insurance on the trucks, but regardless of that fact, we maintain that the status of the appellant should not be based on the question of insurance solely, but that his entire system of operation should be taken into consideration, and that Congress intended, when it passed the Act that every possible consideration should be given to this evidence, for the purpose of keeping legitimate businessmen in business; that the Act was passed to regulate transportation and not to destroy it.

In Dixie-Ohio case and the O. D. L. Forwarding case (supra) the Commission has taken the position that the question of who is to receive a certificate for the transportation of freight is determined largely by who has the responsibility, first to the shipper, and then to the public, and has gone far, especially in the O. D. L. Forwarding case, to hold that the man who contacts the shippers, issues the bills of lading, collects for the shipment of freight, pays for the damages, determines the route over which the freight shall be shipped, should be entitled to the certificate, and, has to all intents and purposes, dominion and control over the vehicles that the freight is being transported in, and that the person who owns the truck and, possibly carries insurance, and pays the permit fees to the various states, and actually and physically operates the truck, but has no connection otherwise with the shipping public, is not entitled to a certificate.

We maintain that this is exactly the situation here. The owner-operators whom appellant had leases with, although

some of them filed applications, either withdrew the same, or did not ask for a hearing, have not continued their operations over the routes and territories applied for by the appellant, except under the lease agreements that he has made with them, and has never claimed any rights since the filing of their applications, and the same have either been withdrawn or abandoned.

At the time that the appellant's case was heard in District Court, the Supreme Court of the United States had not determined the case of United States v. Rosenblum, No. 52, United States v. Margolies, No. 53, and Lubetich v. United States, No. 322, all decided in January 19, 1942.

We earnestly urge that the above cases were very similar to appellant's case, and that in failing to grant any rights whatsoever to the appellant, the Interstate Commerce Commission created a situation where a common carrier of freight did not receive a certificate while the owner-operators of trucks who were hauling for him either failed to make application for certificates or abandoned the same, which results in no one having an operation that, in fact, did exist, and which was a very substantial motor carrier operation over a long period of years.

In the Rosenblum case (supra) the Court said:

> "We think it clear that Congress did not intend to grant multiple 'grandfather' rights on the basis of a single transportation service. Presumably the common carriers which appellees served were entitled to common carrier 'grandfather' rights over the entire line. It was the common carrier who offered the complete transportation service to the general public and the shipper. To hold that appellees, who performed part of that complete transportation service for those common carriers under agreements with them, acquired

contract carrier 'grandfather' rights over the same line entitling them also to serve the public is to ascribe to Congress an intent incompatible with its purpose of regulation. The result would be to create in this case two services offering transportation to the public when there had been only one on the 'grandfather' date, without allowing the Commission to determine if the additional service was in the public interest. And, instances can readily be imagined where a single common carrier might utilize the services of several operators such as appellees. Automatically to grant contract carrier rights to such operators might result in such a wholesale distribution of permits as would defeat the very purpose of federal regulation."

We earnestly maintain that both the Interstate Commerce Commission and the District Court erred in their decision in this matter. That substantial rights of the appellant, which have been developed by him by a life-time of hard work, will be destroyed, and that the appellant should have an opportunity to present his views by brief and argument before the Honorable Court.

We respectfully submit that the Motion of the appellees should be denied.

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